Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–2084 OF 2001
AZAHAR MOHAMED J
5 MAY 2009

Civil Procedure — Pleadings — Issue not pleaded — Whether plaintiff could rely on issue not raised in pleadings

Contract — Breach — Termination of employment — Whether wrongful termination — Whether there was oral promise and assurance to renew contract — Whether there was waiver of term of contract — Whether there was breach of fundamental term of contract

Evidence — Burden of proof — Person who alleged fact had to prove it — Whether plaintiff had proven that there was oral promise and assurance to renew contract on balance of probability

These two actions were consolidated and heard together as one action. The first action related to a contract between the plaintiff and Matsushita Electronic Devices (M) Sdn Bhd ('MEDEM'). MEDEM, a company manufacturing electric components, sells what is termed as scrap, which is actually production waste produced during the manufacturing process, to scrap contractors. The plaintiff was one such scrap contractor engaged by MEDEM, by a contract dated 3 May 2001 ('the MEDEM contract'), to collect and purchase scrap metal from MEDEM's factory in Shah Alam. The contract stipulated that it would take effect from 1 January 2001 and would expire on 31 December 2001. By an undated letter to the plaintiff that was sent by registered post on or about 3 October 2001, MEDEM gave notice to the plaintiff that the MEDEM contract would not be extended. The plaintiff claimed that MEDEM had given a promise and assurance, through its representative, one Chew Fat Nam ('Chew'), that it would renew the MEDEM contract that was due to end on 31 December 2001, and that contrary to this promise and assurance MEDEM had wrongly terminated the MEDEM contract. In the first action, the plaintiff was therefore claiming a declaration that the notice by MEDEM to terminate the contract was null and void. The plaintiff submitted that MEDEM by refusing to renew the

MEDEM contract should be held liable for breach of contract with damages to be assessed by the court. The main issue for determination in the first action was whether Chew as MEDEM's representative had made the alleged promise and assurance to renew the MEDEM contract. The second action related to a contract between the plaintiff and Matsushita Electronic Components (M) Sdn Bhd ('MECOM'), an associate company of MEDEM. On 15 December 1999 MECOM had entered into a three year contract with the plaintiff for the sale of defective electronic capacitors ('the MECOM contract'). Under the MECOM contract, the plaintiff was to crush the scrap products, which it purchased from MECOM at the latter's factory premises. In order to carry out the crushing the plaintiff needed to deliver and install a crushing machine on MECOM's premises within 90 days plus 50 days from the date of the contract. However, as at 20 August 2001, more than one year after the MECOM contract was signed, the crushing machine was not delivered to MECOM's premises. Instead the plaintiff wrote several letters to MECOM giving reasons for the delay in the delivery of the crushing machine. Thereafter, sometime in mid 2001 the plaintiff, via its document entitled 'In-factory Crushing of MEDEM Rejected End-products' (the document) requested that it be released from the conditions imposed on it by the MECOM contract. In response MECOM sent a letter dated 31 December 2001 to the plaintiff informing it that the MECOM contract had been terminated by the plaintiff itself and was therefore no longer in force. The plaintiff then instituted the second action and claimed that MECOM had wrongfully terminated the MECOM contract and was therefore liable, inter alia, for breach of contract with damages to be assessed by the court. The plaintiff submitted that when it commenced the first action against MEDEM, MECOM decided to victimise the plaintiff by terminating its contract with the plaintiff without any notice or prior warning. During the hearing of the second action, the plaintiff contended that MECOM had waived the requirement to install the crushing machine on MECOM's premises because, MECOM had not replied to the plaintiff when the plaintiff had sent it the document giving reasons as to why the installation of the crushing machine should be waived. The issues raised in this second action were whether the plaintiff had specifically pleaded that MECOM had waived the requirement to install the crushing machine on MECOM's premises and whether MECOM had wrongfully terminated the contract.

Held, dismissing the plaintiff's claims with costs:

(1) Section 101 of the Evidence Act 1950 provides that if the plaintiff were to raise the fact of the alleged promise and assurance to renew the MEDEM contract, then the burden was always on the plaintiff to prove that fact on a balance of probability. MEDEM did not owe any duty to the plaintiff to call witnesses to prove the plaintiff's case (see para 11).

(2) The MEDEM contract clearly and without any ambiguity stipulated that the contract would take effect on 1 January 2001 and expire on 31 December 2001. Furthermore cl 9 of the contract provided that MEDEM in its absolute discretion may renew or terminate the plaintiff's services after one year from the date of the agreement, which MEDEM chose to do by way of its letter to the plaintiff. The plaintiff was at all times aware of the various provisions of the MEDEM contract and agreed to execute the MEDEM contract even though there was a complete absence of any indication or suggestion of the alleged promise in the contract. In addition there was no contemporaneous document to prove the plaintiff's assertion in respect of the alleged promise and assurance made by Chew. Therefore, based on the evidence the plaintiff had failed to prove on a balance of probability that Chew had made the alleged promise and assurance to renew the MEDEM contract (see para 13).

(3) It is a cardinal principle of pleadings that the parties to an action are bound by their own pleadings. From the averments in the plaintiff's pleadings it was obvious that the plaintiff had not specifically pleaded that MECOM had waived the requirement to install the crushing machine on MECOM's premises. As such the plaintiff was not entitled to rely on waiver to support its claim. In any case, the plaintiff had failed to comply with the terms of the MECOM contract when it failed to install the crushing machine on MECOM's premises within 90 days plus 50 days from the date of the contract. As such, the plaintiff could not now submit that the installation requirement under the MECOM contract was deemed to be waived (see paras 34 & 35).

(4) In fact the requirement that the plaintiff would install the crushing machine on MECOM's premises within 90 days plus 50 days from the date of the contract is a fundamental term of the MECOM contract. Hence, when the plaintiff failed to perform a fundamental term of the MECOM contract, MECOM was justified in treating the plaintiff's act as one of repudiation of the MECOM contract in its entirety, which it did vide its letter of 31 December 2001 (see para 36 & 37).

[Bahasa Malaysia summary

Kedua-dua tindakan telah disatukan dan didengar bersama sebagai satu tindakan. Tindakan pertama adalah berkaitan kontrak antara plaintif dan Matsushita Electronic Devices (M) Sdn Bhd ('MEDEM'). MEDEM, sebuah syarikat perkilangan komponen elektrik, menjual apa yang dianggap sebagai serpihan, yang sebenarnya buangan pengeluaran semasa proses perkilangan, kepada kontraktor-kontraktor serpihan. Plaintif merupakan salah seorang daripada kontraktor serpihan yang dilantik oleh MEDEM, melalui kontrak

bertarikh 3 Mei 2001 ('kontrak MEDEM'), untuk mengumpul dan membeli besi serpihan dari kilang MEDEM di Shah Alam. Kontrak itu menetapkan bahawa ia akan mula berkuat kuasa pada 1 Januari 2001 dan akan tamat pada 31 Disember 2001. Melalui surat tidak bertarikh kepada plaintif yang telah dihantar melalui pos berdaftar pada atau sekitar 3 Oktober 2001, MEDEM telah memberikan notis kepada plaintif bahawa kontrak MEDEM tidak akan dilanjutkan. Plaintif mendakwa bahawa MEDEM telah berjanji dan memberi jaminan, melalui wakilnya iaitu Chew Fat Nam ('Chew'), bahawa ia akan memperbaharui semula kontrak MEDEM yang akan tamat pada 31 Disember 2001, dan bertentangan dengan janji dan jaminan ini MEDEM telah secara salah menamatkan kontrak MEDEM. Oleh itu, dalam tindakan pertama, plaintif menuntut deklarasi bahawa notis oleh MEDEM untuk menamatkan kontrak adalah terbatal dan tidak sah. Plaintif menghujah bahawa MEDEM disebabkan oleh keengganannya untuk memperbaharui semula kontrak MEDEM, patut diputuskan sebagai bertanggungjawab untuk pelanggaran kontrak dan ganti rugi ditaksirkan oleh mahkamah. Isu utama untuk ditentukan dalam tindakan pertama adalah sama ada Chew sebagai wakil MEDEM telah membuat perjanjian dan memberikan jaminan yang dikatakan untuk memperbaharui semula kontrak MEDEM. Tindakan kedua adalah berkaitan kontrak antara plaintif dan Matsushita Electronic Components (M) Sdn Bhd ('MECOM'), sebuah syarikat bersekutu MEDEM. Pada 15 Disember 1999 MECOM telah memasuki kontrak tiga tahun dengan plaintif untuk jualan kapasitor-kapasitor elektrik yang rosak ('kontrak MECOM'). Di bawah kontrak MECOM, plaintif hendaklah menghancurkan hasil buangan itu, yang dibeli daripada MECOM di premis kilang MECOM. Bagi tujuan melaksanakan penghancuran itu plaintif perlu menghantar dan memasang mesin penghancur di premis MECOM dalam tempoh 90 hari ditambah 50 hari dari tarikh kontrak. Walau bagaimanapun, sehingga 20 Ogos 2001, lebih setahun selepas kontrak MECOM ditandatangani, mesin penghancur tidak dihantar ke premis MECOM. Sebaliknya plaintif menulis beberapa surat kepada MECOM memberi alasan untuk kelewatan mesin penghancur itu. Berikutan itu, sekitar pertengahan tahun 2001, plaintif, melalui dokumennya bertajuk 'In-factory Crushing of MEDEM Rejected End-products' ('dokumen') meminta agar ia dilepaskan daripada syarat-syarat yang dikenakan ke atasnya dalam kontrak MECOM. Sebagai jawapan MECOM telah menghantar surat bertarikh 31 Disember 2001 kepada plaintif memaklumkannya bahawa kontrak MECOM telahpun ditamatkan oleh plaintif sendiri dan tidak lagi berkuat kuasa. Plaintif kemudian telah memulakan tindakan kedua dan mendakwa bahawa MECOM telah menamatkan kontrak MECOM secara salah dan oleh itu bertanggungjawab, antara lain, untuk pelanggaran kontrak dengan ganti rugi ditaksirkan oleh mahkamah. Plaintif menghujah bahawa apabila ia memulakan tindakan pertama terhadap MEDEM, MECOM telah memutuskan untuk menjadikan plaintif mangsa dengan menamatkan kontraknya dengan plaintif tanpa sebarang notis atau amaran. Semasa

perbicaraan tindakan kedua, plaintif menegaskan bahawa MECOM telah mengetepikan keperluan untuk memasang mesin penghancur di premis MECOM kerana, MECOM tidak memberi jawapan kepada plaintif apabila plaintif telah menghantar kepadanya dokumen yang memberikan alasan kenapa pemasangan mesin penghancur itu patut diketepikan. Isu-isu dalam tindakan kedua ini adalah sama ada plaintif telah memplidkan secara spesifik bahawa MECOM telah mengetepikan keperluan untuk memasang mesin penghancur di premis MECOM dan sama ada MECOM telah menamatkan kontrak secara salah.

Diputuskan, menolak tuntutan-tuntutan plaintif dengan kos:

(1) Seksyen 101 Akta Keterangan 1950 memperuntukkan bahawa jika plaintif menimbulkan fakta tentang janji dan jaminan yang dikatakan untuk memperbaharui semula kontrak MEDEM, maka beban sentiasa terletak ke atas plaintif untuk membuktikan fakta itu atas imbangan kebarangkalian. MEDEM tidak mempunyai apa-apa kewajipan ke atas plaintif untuk memanggil saksi bagi membuktikan kes plaintif (lihat perenggan 11).

(2) Kontrak MEDEM adalah jelas dan tiada sebarang ketaksaan yang menetapkan bahawa kontrak itu akan berkuat kuasa pada 1 Januari 2001 dan tamat pada 31 Disember 2001. Tambahan pula klausa 9 kepada kontrak itu memperuntukkan bahawa MEDEM yang mempunyai budi bicara mutlaknya boleh memperbaharui semula atau menamatkan khidmat plaintif selepas setahun daripada tarikh perjanjian, yang mana MEDEM memilih untuk berbuat demikian melalui suratnya kepada plaintif. Plaintif pada setiap masa sedar tentang pelbagai peruntukan kontrak MEDEM dan bersetuju untuk melaksanakan kontrak MEDEM meskipun tiada langsung wujud tanda atau cadangan tentang janji yang dikatakan dalam kontrak. Tambahan pula tiada dokumen sedia ada untuk membuktikan penegasan plaintif berkaitan janji dan jaminan yang dikatakan telah dibuat oleh Chew. Oleh itu, berdasarkan keterangan plaintif telah gagal untuk membuktikan atas imbangan kebarangkalian bahawa Chew telah membuat dakwaan tentang janji dan jaminan untuk memperbaharui semula kontrak MEDEM itu (lihat perenggan 13).

(3) Adalah prinsip utama pliding bahawa pihak-pihak kepada tindakan adalah terikat oleh pliding masing-masing. Berdasarkan penegasan dalam pliding plaintif adalah jelas plaintif tidak memplidkan secara spesifik bahawa MECOM telah mengetepikan keperluan untuk memasang mesin penghancur di premis MECOM. Oleh itu plaintif tidak berhak untuk bergantung kepada penepian untuk menyokong tuntutannya. Walau bagaimanapun, plaintif telah gagal untuk

mematuhi terma-terma kontrak MECOM apabila ia gagal untuk memasang mesin penghancur di premis MECOM dalam tempoh 90 hari ditambah dengan 50 hari dari tarikh kontrak. Oleh itu, plaintif sekarang tidak boleh menghujah bahawa keperluan pemasangan di bawah kontrak MECOM dianggap telah diketepikan (lihat perenggan 34 & 35).

(4) Bahkan keperluan bahawa plaintif akan memasang mesin penghancur di premis MECOM dalam tempoh 90 hari ditambah 50 hari dari tarikh kontrak merupakan terma penting kontrak MECOM. Justeru itu, apabila plaintif gagal melaksanakan terma penting kontrak MECOM itu, MECOM dijustifikasikan dengan menganggap tindakan plaintif sebagai menamatkan kontrak MECOM secara keseluruhannya, yang ia telah lakukan melalui suratnya yang bertarikh 31 Disember 2001 (lihat perenggan 36 & 37).]

Notes

For a case on termination of employment, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2713.

For cases on issue not pleaded, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5447–5451.

For cases on person who alleged fact had to prove it, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 531–535.

Cases referred to

Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599, CA (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)

LSCC Development Sdn Bhd v Thomas a/l Iruthayam & Anor [2007] 4 MLJ 4, CA (refd)

Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor [1995] 2 MLJ 276, HC (refd)

Seah Cheoh Wah v Malayan Banking Bhd & Anor [2009] 7 MLJ 485, HC (refd)

Tenaga National Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)

Legislation referred to

Evidence Act 1950 s 101

MS Murthi (Murthi & Partners) for the plaintiff.
Kevin Prakash (Shook Lin & Bok) for the defendant.

Azahar Mohamed J:

[1] There is one consolidated action before me which consists of two actions. Both the actions were heard and were tried together.

[2] The first action filed by Victory Avenue Mfg (M) Sdn Bhd ('the plaintiff') is against the defendant, Matsushita Electronic Devices (M) Sdn Bhd ('MEDEM') in Suit No D3–22–2084 of 2001 ('the MEDEM suit').

[3] The second action filed by the plaintiff is against the defendant, Matsushita Electronic Components (M) Sdn Bhd (MECOM) in Suit No D7–22–207 of 2002 ('the MECOM suit').

[4] I shall deal with each of them in turn.

THE PLAINTIFF'S CASE IN THE MEDEM SUIT

[5] The plaintiff was engaged by MEDEM as a contractor for the purchase of scrap metal at its factory in Shah Alam since 1996. By an agreement dated 3 May 2001 ('the MEDEM contract'), the plaintiff was engaged by MEDEM for the collection and purchase of scrap metal from MEDEM. I will mention this MEDEM contract in more detail shortly. The plaintiff's case is based on MEDEM's undated letter informing the plaintiff that they did not propose to extend the MEDEM contract after the MEDEM contract expired on 31 December 2001. The plaintiff contends that contrary to its promise and assurance, MEDEM had wrongly terminated the MEDEM contract. On account of this breach, the plaintiff is claiming a declaration that the notice to terminate the contract is null and void. The plaintiff is also claiming for specific performance and damages.

MEDEM'S CASE IN THE MEDEM SUIT

[6] The MEDEM contract stipulated that it would take effect from 1 January 2001 and would expire on 31 December 2001. By an undated letter to the plaintiff and sent by registered post on or about 3 October 2001, MEDEM gave notice to the plaintiff that the MEDEM contract which was due to end by 31 December 2001, would not be extended. MEDEM contends that they were entitled in law not to renew the contractual relationship with the plaintiff. MEDEM further contends that in any event, they did give sufficient notice to the plaintiff of their intention not to renew the contractual relationship between them.

FINDINGS OF THE COURT WITH REGARD TO THE MEDEM SUIT

[7] MEDEM manufactures electronic components for electric equipment. During the manufacturing process there are usually defective components or production waste which MEDEM then sells as scrap to scrap contractors. The plaintiff is one of MEDEM's contractors.

[8] It is not disputed that by the MEDEM contact dated 3 May 2001, the plaintiff was engaged by MEDEM for the collection and purchase of scrap from MEDEM. For easy reference, the material part of the contact is reproduced as follows:

RE: AGREEMENT FOR COLLECTION OF SCRAP

Stated below are rules pertaining to collection of scrap from Matsushita Electronic Devices (M) Sdn Bhd – ECD (herein called the Company) by Victory Avenue Manufacturing (M) Sdn Bhd (herein called the Contractor)

We thank you for your good services you have given us for the past six years and we are looking forward for your continued support.

1) All scrap shall be collected by the contractor on daily basis.

2) There will be no collection of scrap on Saturday/Sunday public holidays and company holidays.

3) Contractor is responsible to collect the scrap from the said premises.

4) Contractor must ensure vehicles and staff comply with MEDEM and government rules and regulations.

5) Contractor must have valid license by government as scrap collector, transporter and storage of scrap.

6) Contractor must be responsible for all act of negligence on your part. MEDEM shall claim damaged due to your negligence.

7) Contractor must comply with MEDEM's Safety & Health Rules and Regulation.

8) Contractor must comply with MEDEM's certified ISO 14001 Rules and Regulation.

9) The company may at its absolute discretion renew of terminated the service of the contractor after (1) year from the date of agreement.

I Moses David Michael IC No 690304-10-6383 Victory Avenue Mfg (M) Sdn Bhd No 10, Jalan Seruling 58, Tai Chong Industrial Park, Kelang Jaya, 41200 Kelang, Selangor Darul Ehsan hereby agree and shall comply to all conditions stated as above. I also agree to have this agreement of scrap collection to be terminated, should I fail to comply with any of the above conditions.

A The agreement is effective from 1st January 2001 to 31st December 2001.

[9] Subsequently, by an undated letter to the plaintiff which the plaintiff had received in early November 2001, MEDEM gave notice to the plaintiff that the contract which was due to end by 31 December 2001, would not be extended. The letter was in the following terms:

B

Mr Moses David Michael

(Chief Executive Officer)

C Victory Avenue Manufacturing (M) Sdn Bhd (Co No 489347-V)

No 10 Jalan Seruling 58, Tai Chong Industrial Park

Taman Klang Jaya

D 41200 Klang Selangor DE

Dear Sir,

RE: DISCONTINUATION OF FUTURE CONTRACT

E In view of the current global market situation, our company has been affected by a serious cost reduction requirement.

Our company has taken many cost measures in all areas to overcome those requirements, inclusive of disposable activities. In this activities all external disposable will be changed to internal activities.

F Due to this situation your contract that is due to end by the 31st of December 2001 will not be extended.

The EC Management wishes to extent our heartfelt gratitude to Victory Avenue for the support and cooperation to us as one of our callable vendor for the past six years.

G Thank you.

[10] The plaintiff's contention is that MEDEM should have extended the MEDEM contract by reason of an alleged promise and assurance made by one Mr Chew Fat Nam before the contract was executed. In his evidence, H Mr Moses David Michael (PW1), the Chief Executive Officer of the plaintiff said that Mr Chew Fat Nam promised and assured him that MEDEM would renew the MEDEM contract as long as the plaintiff continued to render good services to MEDEM. A great emphasis is placed by the plaintiff on the evidence of PW1. And herein lies the dispute. Learned counsel for the I plaintiff argued that the plaintiff has established that MEDEM had given an assurance but reneged on it in November 2001 by refusing to renew the MEDEM contract. He, therefore, argued that MEDEM should be held liable to the plaintiff for breach of contract. The plaintiff further prays for an order that the senior assistant registrar to assess damages.

[11] With that, the critical question arises: Whether Mr Chew Fat Kam made the alleged promise and assurance? For one thing, the burden is at all times borne by the plaintiff to prove its case on the balance of probability. Section 101 of the Evidence Act 1950 states that the person who asserts the existence of any fact must prove the fact exists (see: *Seah Cheoh Wah v Malayan Banking Bhd & Anor* [2009] 7 MLJ 485, *Tenaga National Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 and *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627). For another, it is obvious that MEDEM does not owe any duty to the plaintiff to call any witnesses to prove the plaintiff's case. It is, at this juncture, worth mentioning that Mr Chew Fat Kam was not called to give evidence by the plaintiff or MEDEM. That said, it is equally important to add a further point that the burden is always on the plaintiff to prove that the alleged promise and assurance were in fact made by Mr Chew Fat Kam.

[12] In my view, PW1's version in this respect must be looked at carefully as vexed issues have arisen from his testimony. The fact that PW1 was unshaken in cross-examination is not an all-sufficient test of credibility. The credibility of a witness requires assessment in the light of all the relevant evidence and circumstances. The probability or improbability of a fact in issue must be the principal factor. In this context, how the evidence of PW1 fits in with the rest of the evidence and the circumstances of the case is the prime consideration.

[13] Having said that, in my view the argument of learned counsel for the plaintiff that Mr Chew Fat Kam made the alleged promise and assurance is not free from difficulties. In addressing this issue, it is important to make reference that as against the evidence of PW1 regarding the alleged promise, the fact to be kept in mind, however, is the irrefutable factual situation in this case, that is to say, that the MEDEM contract clearly and without any ambiguity stipulated that the contract would take effect from 1 January 2001 and would expire on 31 December 2001. That clause is clear in its term. Another very important fact that requires to be kept in mind is cl 9 of the MEDEM contract. It is obvious that cl 9 means MEDEM may at its absolute discretion renew or terminate the service of the plaintiff after one (1) year from the date of the agreement. It is a straight forward clause. It is worthy of note that it as an obvious fact the plaintiff was at all times aware of the various provisions of the MEDEM contract. Taken as a whole then, I am unable to accept the evidence of PW1 regarding the alleged promise made by Mr Chew Fat Kam because the plaintiff agreed to execute the MEDEM contract even though there was a complete absence of any indication or suggestion of the alleged promise in the MEDEM contract. And tellingly, the plaintiff did not protest the inclusion cl 9 in the MEDEM contract. All the more so, it is pertinent to make a note that there is no mention whatsoever in the

MEDEM contract which says that the contract would be extended in return for good services rendered by the plaintiff. What is more, I find it difficult to accept PW1's evidence because there is no contemporaneous document to prove the plaintiff's assertion in respect of the alleged promise and assurance made by Mr Chew Fat Kam. In my view, the evidence of PW1 did not fit in with the circumstances of the present case.

[14] Therefore, based on the evidence as presented before me, it is my findings that the plaintiff has failed to prove on the balance of probability that the alleged promise and assurance were made by Mr Chew Fat Kam.

[15] Consequently, I see no alternative but to dismiss with costs the plaintiff's claim against MEDEM in the MEDEM suit.

THE PLAINTIFF'S CASE IN MECOM SUIT

[16] MECOM is an associate company of MEDEM. The plaintiff was engaged by MEDEM as the contractor for the purchase of scrap metal. The scrap metal contract with MEDEM was renewed for the year 1996, 1997, 1998, 1999 and 2001. It is the plaintiff's case that on account of the good track record of the plaintiff, MECOM agreed on 15 December 1999 to enter a separate 3 year contract with the plaintiff for the sale of defective electronic capacitors ('the MECOM contract'). According to the plaintiff, when MEDEM notified the plaintiff that it was not extending the MEDEM contract after 31 December 2001, the plaintiff then commenced the MEDEM suit on 30 November 2001. It is the plaintiff's case that MECOM reacted against the plaintiff and decided to victimise the plaintiff. According to the plaintiff, MECOM without any notice or prior warning terminated the MECOM contract forthwith. Hence, the plaintiff seeks, inter alia, the following reliefs:

(1) A declaration that MECOM has on 13 December 2001 wrongfully terminated the MECOM contract dated 15 December 1999 entered into between the plaintiff and MECOM and thereby is liable to the plaintiff for damages for breach of contract; and

(2) Consequent thereto an order that the senior assistant registrar of this Honourable Court assess damages to be paid by MECOM to the plaintiff for breach of contract.

MECOM'S CASE IN THE MECOM SUIT

[17] MECOM avers that in breach of its obligations under the MECOM contract the plaintiff failed to install the crushing machine in MECOM's premises. The contract provided for the said crushing machine to arrive

within 90 days of the date of the contract and to be set up within 50 days thereafter. Instead of complying with its obligations, which they failed to comply within the stipulated time or at all, the plaintiff forwarded a document in writing to MECOM in or around May/June 2001 in which the plaintiff purported to give reasons why the said contract ought not to be implemented. MECOM avers that the plaintiff was not able, willing and ready to comply with its contractual obligations under the MECOM contract and thus by a letter dated 31 December 2001, MECOM advised the plaintiff that MECOM contract had been terminated by the plaintiff itself and was no longer in force.

FINDINGS OF THE COURT WITH REGARD TO MECOM SUIT

[18] It is not disputed that by the MECOM contract dated 15 December 1999, the plaintiff had entered into an internal crushing agreement with MECOM. The material part of the MECOM contract is reproduced as follows:

RE: INTERNAL CRUSHING AGREEMENT

This agreement witnesseth in consideration of Matsushita Electronic Components (M) Sdn Bhd (herein called the Company) and Victory Avenue Manufacturing (herein called the Contractor).

The Company agrees (subject to the conditions contained herein) or endorsed, otherwise expressed, herein deemed to the conditions precedent to the rights of both parties.

The conditions and stipulations referred to in this agreement are as follows:

a) The Company shall provide a working area of approximately 40 sq ft x 40 sq ft for the sole purpose of installation of the crushing machine which shall be used entirely for crushing the abandon product.

b) The Company shall provide the utility requirements as required by the Contractor for efficient operation of the crushing machine.

c) The Contractor shall confirm the design of the crushing machine and the dust collector as to the requirements of the Malaysian Environmental Law and Regulations stipulated under The Quality Act 1974.

d) The Contractor shall at his own expenses furnish the Company with such plans, specifications, measurements, quantities and any other particulars regarding the crushing machine work site.

e) The contractor shall at his own expenses provide (2) full-time workers to the operation of the abandon product crushing process, as to the operation of the company's normal working calendar.

A f) The contractor shall at all times, at his own expenses, produce, procure and give to the company all such particulars, books, vouchers, invoices, duplicates or copies thereof, documents proof and information reasonably required by, or on behalf of the Company.

B g) The Contractor shall be directly or indirectly liable for utility cost incurred as to the operation of the crushing process.

h) The Company may at its absolute discretion renew or terminate the service of the contractor after three (3) years from the inception date of this agreement.

C i) The Company shall sell at the price of RM0.35 per k/g of the abandon product to the contractor.

j) In no case whatsoever shall the company be liable for any loss or damage of the crushing work-site and the machineries.

D The conditions conferred by this agreement shall be exercisable by the company and the Contractor.

At the same time Victory Avenue Mfg. request is:-

E i) Any other additional costs other then your requirements from Victory Avenue Mfg. Sdn. Bhd. shall be borne by you.

ii) It will take about 90 days for the arrival of the machine and 50 days for the setting up.

F iii) We will proceed with our arrangements once the agreement is signed.

[19] At this point, it is important to take note that by this MECOM contract, the plaintiff was to crush the scrap or abandoned products, which G it purchased from MECOM, on MECOM's premises and not on the plaintiff's premises. The plaintiff was to deliver and install its crushing machine on MECOM's premises within 90 days of the date of the contract which would be set up for crushing within 50 days thereafter. MECOM was to sell the abandoned product or scrap to the plaintiff at RM0.35 per kg.

H

[20] What follows thereafter was that the plaintiff wrote to MECOM giving several reasons as to why the crushing machine had not been delivered and assured that the machine would be delivered shortly. The plaintiff's letter dated 20 April 2000 reads:

I

REF: INTERNAL CRUSHING

A discussion on internal crushing was held at Matsushita on the 11th April 2000 at 2.30 pm between Mr Sukumaran, Mr Willy, M Bhajan and our Mr K Neelemogan.

The topic was the arrival of the crushing machine.

The machine that was to have arrived on the 25th March 2000 did not arrive even until the day of the discussion.

We had informed all at the meeting and they are all aware of this situation. Today we are happy to say that the machine arrived on 19th April.

1. The cause of this delay is due to the fact that, as we are heading towards ISO 14000, we had arranged for certain changes to be done during the designing of the machine. We are bringing in this machine as a sample for ISO 14000 standards.

2. Mr Sukumaran was anxious as to whether we can bring the machine into their premises, since Matsushita is an LMW Lisenced company. This should not be a problem because the machine has already been checked by the customs and duty has already been paid.

3. Mr Bhajan requested for a meeting between the charge men of Matsushita and the technician who is installing the machine. We will arrange a meeting within a week. Regarding the decibel required by Mr Bhajan the input and output of sound from the machine can be detected with the use of the dosimeter. This can be done only when the machine is in operation. According to our previous spec of the machine, the percentage was around 80%.

4. Matsushita has to arrange a specific area for the machine, mainly because we will require the exact location, for the application of the Occupational Safety and Health Act. This can be done only after the setting up of the machine. We will attach the flow-chart together with our letter.

5. We have already applied for the approval of the machine from DOE on the 17th April 2000. And we are supposed to meet them on Friday with the catalogues.

[21] By the above letter the plaintiff gave several reasons as to why the crushing machine had not been delivered and assured MECOM that it would be delivered shortly. As it turned out, it was never done.

[22] Not long after that the plaintiff wrote to MECOM the following letter dated 28 June 2000:

REF: CRUSHING MACHINE

With reference to the meeting that took place on the 25th April 2000 I would like to bring to your attention that the crusher machine will be in Victory Avenue Manufacturing (M) Sdn Bhd on the 15th July 2000.

As discussed we were supposed to have the machine ready by 30th June 2000.

A But we regret to say that we were facing a minor mechanical problem at that moment.

Also it was only on the 24th June that the DOE gave the approval, which was only for the plant. aThe parts and fittings are completed and the machine will be ready for a test-run by the 14th July 2000.

B We would appreciate if you can come over and see the machine some time after the 15th July 2000 before we put it into operation.

Kindly advise us on the date and time of your visit.

C **[23]** The plaintiff by the letter dated 28 June 2000 informed MECOM that it was facing mechanical problems and the machine would be ready for a test run by 14 July 2000. But then again, the crushing machine was not delivered even after 14 July 2000.

D **[24]** By a letter dated 15 August 2001 the plaintiff requested a meeting to discuss the MECOM contract. The letter reads:

Ref: An Appointment to Discuss Internal Crushing for Defective Electrolytic Capacitor

E Referring to the above matter would like to have an appointment with your goodself, respectively on the 20th of August 2001 at 5.00pm to discuss about the Internal Crushing. Could you please let us know your convenience time if there is any hesitation? Your co-operation is much appreciated, kindly waiting for reply.

F **[25]** Shortly thereafter, by a letter dated 20 August 2001, the plaintiff requested for an appointment to discuss the MECOM contract:

Ref: An Appointment to Discus Internal Crushing for Defective Electrolytic Capacitor

G Referring to the above matter would like to have an appointment with your goodself, respectively on the 23th of August 2001 at 3.00pm to discuss about the Internal Crushing. Could you please let us know your convenience time if there is any hesitation? Your co-operation is much appreciated, kindly waiting for reply.

H **[26]** In relation to the two letters dated 15 August 2001 and 20 August 2001, one important fact to be kept in mind is that these letters were sent more than one year after MECOM contract was signed but the crushing machine had still not been delivered to MECOM's premises even as at 20 August 2001.

I **[27]** Going back a little, sometime in mid 2001, the plaintiff, via its document entitled 'In-Factory Crushing of MEDEM Rejected End-Products', requested that it be released from conditions imposed. The request was in the following terms:

To request permission for release conditions imposed by Matsushita Electronics Devices (MEDEM) through the signed 'Internal Crushing Agreement' dated 15 December 1999 that Victory Avenue manufacturing installs & maintains 'Crushing Machine' within the MEDEM factory to crush the rejected 'MEDEM END-PRODUCTS'.

This presentation outlines the successful current work of crushing these MEDEM rejected end-products within Victory Avenue that is efficient & compliant and furthermore has never breached any MEDEM security or safety or any other MEDEM requirement over the past 5 years or more of these crushing work processes being carried out by Victory Avenue Manufacturing.

Vice versa, we outline also, the difficulties & liabilities to MEDEM & Victory in the event the contract conditions continue to be imposed.

[28] At this stage, I should add a further point to give some context. It is this. As at 20 August 2001, all the evidence point to the fact that the plaintiff itself was not able to comply with its obligations under the MECOM contract.

[29] After that, an important event happened. On 13 December 2001, MECOM sent the following letter to the plaintiff:

Victory Avenue Manufacturing (M) Sdn Bhd

No 10, Jalan Seruling 58,

Tai Chong Industrial Park

Taman Klang Jaya

41200 Klang.

Dear Sirs,

Re: Agreement dated 15 December 1999 between Victory Avenue Manufacturing (M) Sdn Bhd and Matsushita Electronic Components (M) Sdn Bhd.

We refer to the captioned Agreement and confirm that:

(a) You did not in breach of the said Agreement; install the crushing machine in the designated premises within the stipulated period or at all.

(b) You had requested to be 'freed or released' from your contractual obligations.

2. In the circumstances, we are advised that the said Agreement has been terminated by yourselves and is no longer in force.

[30] By that letter, MECOM informed the plaintiff that the MECOM contract had been terminated by the plaintiff itself and was no longer in force.

[31] Now, it is the contention of learned counsel for the plaintiff that MECOM had waived the requirement to install the crushing machine on MECOM's premises. He argued that the plaintiff had sent letters to MECOM for discussion about the installation of the crushing machine. The plaintiff had also sent a document to MECOM setting out the grounds as to why the installation of the crushing machine should be waivered. Learned counsel stressed that there was not a single reply to all the plaintiff's letters and document and that MECOM contract runs for two out of the three years before it was terminated. In this way, argued learned counsel for the plaintiff, MECOM had waived the requirement to install the crushing machine after 140 days by remaining silent for the rest of the two (2) years before termination.

[32] In relation to the submission of learned counsel for the plaintiff, one very important fact requires to be kept in mind that cannot be overlooked. It is a cardinal principle of pleadings that the parties to an action are bound by their own pleadings. The courts are also bound by the pleadings in as much as the parties themselves. The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the courts. This must be emphasised since this court is not unconstrained to decide on an action on which no issue has been raised by the parties in their respective pleadings. These principles were shown in a number of cases. I would only draw attention to three cases.

[33] First of all is the case of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 where Sharma J had this to say at p 196:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to factual position then it is hardly open to the court to come to a finding different from such agree facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

[34] Secondly, the following passage in the judgment of James Foong J (as His Lordship then was) in *Metroplex Development Sdn Bhd v Mohd Mastana bin Makaddas & Anor* [1995] 2 MLJ 276 at p 284:

> The primary function of the statement of claim is to plead reasonable cause of action against the defendant. Therefore, it must contain all material facts on which the plaintiff relies for his claim. It must also disclose the legal liability of the

defendant. By this, it is essential to establish a linkage between material facts pleaded in the statement of claim and the substantive right which the plaintiff claims or seeks to enforce against the defendant. Thus, in a case where breach of duty is alleged, the facts upon which the alleged duty is founded must be pleaded, and where there is an allegation of negligence, facts must be set out showing the existence of a duty to take reasonable care owed to the particular person or class of person and that duty was disregarded—see the judgment of Wallis J in *Gantret v Egerton* [1987] LR 2 CP 371, which was adopted in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391. Further, in claims where subjective knowledge of the defendant is to be implicated such as they 'ought to know' or 'ought to have known', material facts relating to such matters must be pleaded—see the case of *Fax v H Wood (Harrow) Ltd* [1963] 2 QB 601; [1962] 1 All ER 1100; [1962] 3 WLR 1513.

[35] And finally, the decision of our Court of Appeal in the case of *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599 where it was held that the rule that parties should be confined to the issues raised in their pleadings applies equally in the Industrial Court. This rule is based on justice and equity because it is unfair and unjust to permit a party to raise other points of complaint at the trial of which no formal notice has been given. The Court of Appeal held that the Industrial Court Chairman in that case made a mistake by permitting the plaintiff to raise all sorts of other matters which were only calculated to prejudice the fair trial of the case. There, speaking for the Court of Appeal Mahadev Shankar JCA said:

He also took into account irrelevant considerations by going into previous acts of alleged victimisation which were not pleaded but brought out for the first time at the hearing in the Industrial Court. Contrary to Anwar's statement of claim there was no evidence whatsoever that he had been 'relieved of his administrative functions' on 17 or 19 October 1989. The doctrine of waiver or condonation applies equally to employees. Therefore if cumulative misconduct is being urged it must be pleaded and evidence has to be given to show that each misconduct was so connected with the culminating act of misconduct as to form part of the same transaction. That is not what was pleaded here.

[36] Returning to the present case, learned counsel for the plaintiff has drawn my attention to paras 21–25 of the statement of claim to support his argument that waiver has been pleaded. However, I cannot see from the averments in the plaintiff's pleadings that it has specifically pleaded that MECOM had waived the need to install the crushing machine on MECOM's premises. For that reason, the argument of learned counsel for the plaintiff that MECOM had waived the requirement to install the crushing machine on MECOM's premises is unsustainable. The plaintiff is not entitled to rely on waiver to support its claim.

[37] In any event, even if the plaintiff had pleaded waiver in their pleadings, it would not have assisted their case. It cannot be be said that MECOM had waived the requirement to install the crushing machine as it was the plaintiff who was obliged to install the crushing machine within 90 days plus 50 days from the date of the MECOM contract. I agree with the arguments of learned counsel for MECOM that it was the plaintiff who had failed to comply with the terms of the MECOM contract for over two years and cannot now say that MECOM was somehow obliged to repeatedly request that the crushing machine be installed, failing which the installation requirement under the MECOM contract would be deemed to be waived.

[38] Now, in my view, the requirement that the plaintiff was to deliver and install its crushing machine on MECOM's premises within 90 days of the date of the contact which would be set up for crushing within 50 days thereafter is a fundamental term of the MECOM contract. As it turned out, the crushing machine which was supposed to have been delivered and installed on MECOM's premises, was never delivered. Hence, in my view, the fundamental term of the MECOM contract was never performed by the plaintiff. What is the effect? In the light of the plaintiff's failure to deliver and install the crushing machine on MECOM's premises within the period prescribed in the MECOM contract and that there was never any waiver, MECOM was justified to treat the plaintiff's act was one of repudiation of the MECOM contract. The plaintiff was not able to meet the MECOM contract's terms. To my mind, this is what truly happened. Having regard to the plaintiff's pleaded case and the factual matrix in this case, the act of the plaintiff can be construed as repudiating the MECOM contract in its entirety. In *LSCC Development Sdn Bhd v Thomas a/l Iruthayam & Anor* [2007] 4 MLJ 4 Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal said:

> Where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. The rationale is that the primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. See *Moschi v Lep Air Services Ltd* [1973] AC 331. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee — the innocent party — is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible.

[39] Thus, going by this principle, in my judgment, MECOM accordingly was entitled to accept the wrongful repudiation, which it did vide its letter of 13 December 2001. Consequently, I also see no alternative but to dismiss

with costs the plaintiff's claim against MECOM in the MECOM suit.

CONCLUSION

[40] For all the reasons already given, I make the following orders:

(i) I dismiss the plaintiff's claim against MEDEM (the MEDEM suit) with costs.

(ii) I also dismiss the plaintiff's claim against MECOM (the MECOM suit) with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan